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THE NECESSITY FOR A PUBLIC DEFENDER

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Among the grave legal and sociological reforms which are being seriously urged at present by thinking people, there is being actively agitated the important proposition of creating the office of a Public Defender to defend indigent persons accused of crime.

If by the establishment of such an office, the standard of our criminal jurisprudence can be raised and the principles of human justice thereby placed upon a more solid foundation, the inevitable result thereof must be, that the suspicion now lurking in the public mind to the effect that a discrimination exists between the rich and the poor, must give way to a wholesome realization of the fact that our much vaunted theory of "equality before the law" has become an actuality—instead of a mere high-sounding phrase.

It must be apparent to all, that the important consideration in the trial of any cause, is, (or ought to be) to ascertain the truth—and not a mere contest in which one side or the other is permitted to gain an advantage by superior strategy, skill or power. And yet, Judge Edward Swann, of the New York Court of General Sessions in a recent newspaper article, written by him, made the remarkable statement, that "the modern trial is not an effort on both sides to arrive at the truth and the merits of the controversy but a contest in which the district attorney tries to get the facts in evidence and the defendants try to keep them out by every means within the rules." If the ascertainment of the truth really is the all important mission of a trial—or on the other hand—if as contended by Judge Swann, the modern trial is merely a contest in which the truth is relegated to a minor position—in either aspect—it follows as a logical sequence, that any method or procedure by which the truth can be more definitely established, or which will elevate the standard of criminal trials to their true function, must necessarily commend itself to the thoughtful intelligence of a civilized community. Judge Swann's arraignment of the modern criminal trial, while made in support of his views against the establishment of a Public Defender, is nevertheless an effective argument in favor thereof.

There must be something radically wrong with a system which does not afford to all classes of accused persons, an equal opportunity to procure all available witnesses or competent expert testimony, which does not give an ignorant or indigent defendant the benefit of able and experienced counsel, which does not afford full opportunity for investigation, to the same degree as is possessed by an accuser, acting through a public prosecutor.

It must be borne in mind at the outset, that it is no more the function of the state to convict the guilty than to shield the innocent. It is also clear that under our legal system, the presumption of innocence attaches to the accused until he is proven guilty. If these

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theories have any real value, it is a natural conclusion that the state should extend its powerful aid and protection to the accused as well as to the accuser—otherwise the much discussed “presumption of innocence” is merely a beautiful illusion. A procedure which permits an accuser—perhaps malicious or vindictive—and possibly not averse to committing perjury—to start in motion, the great and efficient legal machinery of the state and denies to the presumptively innocent accused the same powerful forces for his defense, is unjust and vicious—being based neither upon true equity or sound reasoning.

That there is an inherent weakness in our administration of the criminal law and in our approach to the ideal of justice, is evidenced by the constant attacks and criticisms which have been and are now being leveled against conditions existing in our courts. Leading newspapers and magazines frequently comment thereon in vigorous editorials. Distinguished lawyers, law reformers and sociologists have described numerous abuses and specific instances of the perversion of justice and the general public has gotten the somewhat indelible impression, that the poor man accused of crime is not on an equal footing with the rich defendant. It is scarcely necessary to cite instances to prove the latter assertion—but lest we be charged with misguided sentimentality, it may not be amiss to quote from so eminent a lawyer and broad-minded a citizen as ex-President Taft, who said in a recent speech:

“Of all the questions that are before the American people, I regard no one as more important than this, to-wit, *the improvement of the administration of justice*. We must make it so that the poor man will have as nearly as possible an opportunity in litigating as the rich man *and under present conditions, ashamed as we may be of it, this is not the fact.*”

The result accomplished in the case of Henry Siegel, the banker who was recently convicted in New York, and which result has been severely condemned, is not likely to minimize this general public impression that a discrimination exists in favor of the criminal who operates on a gigantic scale—and fleches millions—as against the poor unfortunate, whose necessity drives him to steal enough to keep body and soul together.

Despite the so-called “safeguards of our liberty,” which apparently surround the accused in most American states, viz.: the preliminary hearing before a magistrate, the indictment by a Grand Jury, the required unanimous verdict of a petit jury, the presumption of innocence, the rule as to reasonable doubt, the presumed quasi-judicial character of the District Attorney, the independent investigations made by his office staff, as well as by a probation officer, the facts are, that often the accused is not represented by counsel in the Magistrate’s Court, that frequently a prisoner is held by the Magistrate for the Grand Jury in cases where the Magistrate lacks the courage to dismiss the complaint and prefers to place the responsibility upon the Grand Jury, that prosecutors usually make a one-sided examination, based upon the information furnished by the complainant,

that the Grand Jury investigation is usually *ex parte*, that the District Attorney is the official adviser to the Grand Jury and that his recommendations are usually followed by that body. While the theory is, that a District Attorney should have due regard for the rights of a defendant, the fact is, and experience has shown in many criminal cases, that he is a prosecutor, that the public expects and pays him to prosecute, that he cannot be both a prosecutor and a defender and that he is necessarily, more or less a partisan. An indigent person who goes to trial with assigned counsel, who is either indifferent, incontinent, unscrupulous or working without compensation (except in some jurisdictions, in capital cases) is naturally at a disadvantage, as compared with the more fortunate defendant who is able to employ skilled counsel to contest the issue with the powerful, experienced and resourceful prosecutor. Notwithstanding all the so-called "safeguards" there can be no denial of the fact that the contest between the State and the indigent defendant is an unequal battle and it is so regarded by those who are familiar with the conditions existing in the criminal courts. Even the champions of the present system do not pretend that assigned counsel render satisfactory or conscientious service to the accused, they concede that in cases where expert testimony is required that an indigent defendant is at a distinct disadvantage—and many criminal judges have criticized the present system of assigning counsel without compensation—as well as to comment unfavorably upon specific abuses brought to their notice.

It is most unfortunate that the evil methods practised by a certain type of criminal lawyer have had a tendency to bring the entire profession of the law into disrepute.

There are those who would have us believe that it is absolutely impossible for an innocent person to be convicted, that a miscarriage of justice is quite inconceivable, that the poor defendant is on an exact equality before the law as a rich defendant, that the average assigned counsel serving without compensation, fully protects and defends the accused, that district attorneys are infallible and uniformly impartial—in short, they seek to convince us that our very human agencies in the prosecution and trial of accused persons, are so perfect, that for one to even suggest a contrary opinion, or to criticize prevailing conditions, lays him open to the charge of attacking our judicial institutions, or reflecting upon "constituted authority." The tender solicitude shown by some people for "constituted authority" must give way to the more important principle of meting out equal justice to all classes of accused persons.

The numerous reversals by appellate tribunals of convictions based upon unfair trials, improper tactics, or the prejudicial attitude of the District Attorney or the trial judge, completely refute the claim that the rights of the accused are always properly protected. Nor is there any adequate compensation to the innocent man who is unjustly indicted and imprisoned and possibly ruined, by the cost of establishing his innocence.

What is the remedy proposed for the manifestly unfair discrimi-

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nation against the indigent accused? Not a mere sentimental, fanciful theory—not a revolutionary or Utopian idea—but a vital, practical, economical plan—which has the prestige of successful operation in some of our large cities to lend weighty support to its basic principle. The establishment of a Public Defender is the logical key to a solution of the problem. He should be an elected official, his compensation should be large enough to attract the highest type of lawyer, he should be as powerful and independent as the District Attorney, he should have such assistants, investigators and resources as may be necessary to properly conduct his office, he should have a definite standing before the Grand Jury, in order if possible to prevent indictment in cases where by reason of his investigation, he believes that an irreparable injury will be done thereby to an innocent person, he should protect the rights of a defendant who calls upon him for assistance—in every phase of the proceedings wherein the District Attorney appears—commencing at the preliminary hearing before a Magistrate. It is not his function to endeavor to defeat the ends of justice—but rather to co-operate with the District Attorney, whenever not inconsistent with his duty to his client, and whenever possible, in order to bring about an ideal administration of the law. His duty should be plainly directed to shielding an innocent defendant or obtaining a just and fair punishment for one found guilty—not to seek to acquit a guilty one.

It is confidently asserted, that some of the advantages which will accrue from this office, are the following: that the theoretical "safeguards" now thrown about the accused will be rendered more effective through a genuine protection of his rights; that cases would be more honestly and ably presented; that perjured and unscrupulous defenses would be materially reduced; that unfair discrimination between different classes of prisoners will be eliminated; that justice will be more speedily administered, thereby reducing the confinement in jail of one awaiting trial—and in larger cities reducing the prison congestion; that a certain type of criminal lawyers will speedily disappear; that the truth in any trial could be more easily developed; that the expense to the county would be decreased and that the whole tone of a criminal trial and of the criminal courts will be elevated by a higher ideal of justice.

What are the objections raised to the Public Defender proposition? Firstly, that the accused is already too carefully safeguarded under our laws; secondly, that the additional expense of creating the office will impose a new burden on the taxpayer; thirdly, that (as stated by Judge Swann) "the office of Public Defender is an anomaly in the law," because the people employ a District Attorney to present the facts in evidence and would also employ a defender "to keep such facts out of evidence."

Taking up the third objection, the learned judge apparently misconceives the true function of a Public Defender. Such official, would, we take it, violate his official oath were he to defeat the ends of justice by attempting to suppress facts which should be received in

evidence as bearing upon the issue in dispute. His duty would be to present all the facts and the law applicable to the case and not to seek to discredit the administration of justice by merely matching wits with his opponent. The accused is entitled to counsel as a matter of right—even private counsel is not justified in keeping material facts out of evidence—what is there then to justify the characterization of a Public Defender as “an anomaly in the law”? If the presumption of innocence has any force or meaning, the due administration of justice requires that the people exert as much effort to defend as to prosecute a case.

As to the second objection urged, it is but necessary to say that it has been demonstrated in Los Angeles (as hereinafter mentioned) that the office has resulted in a saving of expense to the county. But, assuming that additional expense would be necessarily incurred by establishing such office—would it not be amply justified if thereby the liberty of the individual could be better secured and our standard of justice more highly developed? We have heretofore discussed the objection as to the present “safeguards,” which surround the accused.

Having suggested what I conceive to be the appropriate and necessary remedy for the abuses referred to, let us briefly consider the other remedies which have been proclaimed by the opponents of the defender plan, with much vigor and enthusiasm, viz.:

1. That the local bar associations should secure a list of reputable attorneys to volunteer their services to defend indigent accused persons.

2. That Legal Aid Societies or other voluntary charitable organizations, should undertake the defense of such persons.

3. That the trial judge should fix a compensation to assigned counsel in each case, such compensation to be paid by the County.

Neither of such remedies affords an adequate solution of the question. Private counsel should not be asked or expected to give their time and skill to accused persons, without compensation, to the exclusion of their other cases. Neither is it fair to the prisoner to be so defended. I take issue with Judge Swann's assertion that the Legal Aid Society “performs greater service to the community than a Public Defender could.” Conceding that such organizations do splendid work and should be encouraged, I maintain that an indigent accused (and presumed to be innocent) should not be dependent upon any charity, organized or otherwise, for the resources or opportunity to present an adequate defense, but that he should be entitled as a matter of abstract right and justice to be defended by a sworn public official, who would have a positive duty, as well as the power and standing, to properly protect the interests of the accused. Neither private or public charity, no matter how meritorious, will avail as a sufficient substitute for the denial of a legal right.

The suggestion as to compensating assigned counsel would lead to abuses—by making it possible to show favoritism to certain lawyers—and in addition, would most likely result in a greater expense to

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the county than the creation of a Public Defender—without the benefits accruing from a Public Defender.

The Public Defender's office in Los Angeles is now beyond the experimental stage—and is pronounced by its able and distinguished incumbent, Hon. Walton J. Wood, as well as by the local judges, District Attorney and enlightened public opinion, to be an unqualified success. The office has been approved on the score of "efficiency and economy" (to quote Judge Willis). In Oklahoma there has been a Public Defender for several years, although his office is somewhat different from the one now proposed. Houston, Evansville, Salt Lake City, Seattle, Boston, Kansas City, Portland, Ore., Chicago, New York and other large communities are actively agitating this innovation and the movement is becoming national in scope. The intelligent thought of our people is now fully alive to the necessity of adopting this fundamentally sound idea.

Various Bar Associations in New York, Brooklyn and throughout the country are investigating the subject. The Massachusetts Commission of Immigration has warmly recommended the establishment of such an office in that commonwealth. The writer, in the course of his activities as Chairman of a sub-committee of the Committee on Courts of Criminal Procedure of the New York County Lawyers' Association appointed to consider the proposed plan, has had ample opportunity to note the very favorable opinions thereon, expressed by judges, lawyers and laymen.

While it is not startling or strange that various criminal judges, district attorneys and members of the criminal bar, believing the present movement to be a reflection upon their methods, or upon "constituted authority," have expressed opposition thereto, it is gratifying to observe that among their number are found many sufficiently broad-minded and progressive to criticize prevailing conditions and to approve the proposed remedy. Judge Wesley O. Howard, of the Appellate Division, Supreme Court, 3rd Department, New York, in a recent public address, made a powerful plea for the establishment of a Public Defender, in the course of which he said: "No law could be more economical, nor more humane." As a former prosecutor and as a judge, he is well qualified to speak with authority upon the subject.

A bill creating the office of Public Defender, which is to be submitted to the New York Legislature of 1915, has been prepared by the writer and powerful support for such legislation is assured. Legislators in various other States have indicated their intention to offer similar bills—so that a persistent and comprehensive campaign is being waged throughout the United States to accomplish the desired purpose.

It requires merely the awakening of the public conscience to bring about progressive legislation of the necessary character. Our citizens are being fully aroused to the economic, financial and social needs of the country. It is not unreasonable to expect that when their serious thought is directed toward the consideration of a higher ideal in the administration of justice, that they will, with all the power and force of an aroused public opinion, demand the establishment of a Public Defender.